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Francisco Valdes

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# Afterword

## CULTURE BY LAW: BACKLASH AS JURISPRUDENCE

FRANCISCO VALDES\*

### I. INTRODUCTION

FOR the ninth time in as many years, LatCritters<sup>1</sup> met in 2004 during the Cinco de Mayo weekend. We met not only to help recall the unjust events of that day a century and a half ago, but also to center and challenge its unjust legacies in law and society.<sup>2</sup> These legacies live on in many forms and many ways, of course.<sup>3</sup> Against this backdrop, the LatCrit

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\* Professor of Law and Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami. I thank the organizers, sponsors and participants of the LatCrit IX conference, upon which this symposium is based, and in particular the symposium contributors and law review editors whose work has created a lasting record of that stupendous conference. In particular, I thank Matthew Goulding, Lauren Cates, Thomas Lamprecht, Jaret Gronczewski and the other editors of the Villanova Law Review for their work and dedication to this project. This Afterword additionally is in part based, and builds, on previous efforts to analyze critically backlash kulturkampf as an overarching sociolegal phenomenon that necessarily frames the work of contemporary legal scholars. Finally, I dedicate this Afterword to Jerome Culp—friend and warrior—who passed away in February 2004; this LatCrit conference was the first he missed, and we in turn missed him dearly. As always, all errors are mine.

1. The term “LatCrit” was coined at a 1995 colloquium, held in Puerto Rico, on the relationship of critical race theory to “Latina/o” communities. From that colloquium, the annual conferences then flowed. See Francisco Valdes, *Forward: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (introducing first LatCrit conference papers and proceedings). Despite our common identification as LatCrits, this jurisprudential community, like “Latinas/os” and other social groups, is formed from a collection of “different” individuals. See Sylvia A. Marotta & Jorge G. Garcia, *Latinos in the United States in 2000*, 25 HISP. J. BEHAV. SCI. 13 (2003) (providing current demographic portrait); see also Luis Angel Toro, “A People Distinct from Others”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEXAS TECH. L. REV. 1219, 1253 (1995) (critiquing ramifications of current labeling system in United States that “lumps all people who can connect themselves to some ‘Spanish origin or culture’ together as ‘Hispanics’”).

2. See Symposium, *Understanding the Treaty of Guadalupe Hidalgo on Its 150th Anniversary*, 5 SW. J. L. & TRADE AM. 1 (1998) (reviewing treaty by which United States annexed Mexican lands and persons, as well as treaty’s violation since then).

3. During the past nine years, LatCrit scholars have produced nearly twenty law review symposia in which we explore the manifold ways in which these colonial and neocolonial legacies continue to deform law and society. The LatCrit symposia, including those not based on subsequent conferences or colloquia, include Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LATCRIT I); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997) (publishing proceedings of first LatCrit colloquium focused on interna-

IX conference theme beckoned the critical collective attention toward *Countering Kulturkampf Politics Through Critique and Justice Pedagogy*.<sup>4</sup> With this year's call and focus, the LatCrit IX conference invited all OutCrit scholars and friends to train attention on the retrogressively synergistic consequences of backlash kulturkampf on law and society.<sup>5</sup>

In response, the contributors to this symposium<sup>6</sup> have covered a range of issues regarding both the culture wars and the value of social justice pedagogies as an act of resistance to their ideological and political

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tional law); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998) (LATCRIT II); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LATCRIT III); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000) (LATCRIT IV); Colloquium, *Spain, The Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 U. MIAMI INT'L. & COMP. L. REV. 1 (2000-01) (publishing proceedings of first and second colloquia held in Malaga, Spain on LatCrit theory and international and comparative law); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001) (LATCRIT V); Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 FLA. L. REV. 1 (2003), 54 RUTGERS L. REV. 803 (2002) (LATCRIT VI); Symposium, *Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13 LA RAZA L.J. 113 (2002), 81 OR. L. REV. 587 (2002) (LATCRIT VII); Symposium, *City and Citizen: Operations of Power, Strategies of Resistance*, 52 CLEVE. ST. L. REV. 1 (2005) (LATCRIT VIII). In addition to these conference-based publications, two joint LatCrit symposia also have been published during this time. See Joint Symposium, *Culture, Language, Sexuality and Law: LatCrit Theory and the Construction of the Nation*, 5 MICH. J. RACE & L. 787 (2000); 33 U. MICH. J.L. REFORM 203 (2000); Joint Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); 10 LA RAZA L.J. 1 (1998).

4. To view the LatCrit IX Call for Papers, please visit the LatCrit website at [www.latcrit.org](http://www.latcrit.org).

5. OutCrit positionality is framed around the need to confront in collective and coordinated ways the mutually-reinforcing tenets and effects of two sociological macro-structures that currently operate both domestically and internationally: Euroheteropatriarchy and neoliberal globalization. For further discussion of this designation, see Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000), [hereinafter *Outsider Scholars*] (discussing relationship between Euroheteropatriarchy and OutCrit theory and praxis). The term "outsider jurisprudence" was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989) (describing feminist and color based movements as "outsider jurisprudence"). As noted at *infra* note 27, LatCrit theory is one strand in outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship and Queer legal theory. See generally Francisco Valdes, *Afterword: Theorizing "Out-Crit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (drawing LatCrit lessons from experiences of other outsider efforts, principally those of RaceCrits and QueerCrits).

6. The LatCrit IX symposium is a joint publication of the Villanova Law Review and the Seton Hall Law Review. Each journal is publishing different "clusters" of essays defined thematically based on the proceedings of the LatCrit IX conference. For a further discussion on presentations of past symposia, see *supra* notes 1-3 and visit the LatCrit website at [www.latcrit.org](http://www.latcrit.org).

pressures.<sup>7</sup> Symposium authors have brought this new cross-disciplinary resource of substantive and pedagogical knowledge to counter the neocolonial cultural warfare that seeks to degrade LatCrit identities, communities, principles and, even, LatCrit work. This Afterword now closes this year's LatCrit symposium by focusing squarely on this sociolegal phenomenon: backlash kulturkampf.<sup>8</sup>

The liberty-privacy mini-case study sketched below illustrates how backlashes use judicial review in precisely the selective ways that they so denounce loudly.<sup>9</sup> It illustrates the struggle over the liberal legacies of the

7. These contributions include the uses of various familiar identity axes, such as race, gender, sexuality and class, to define and wage backlash kulturkampf. See, e.g., Tayyab Mahmud, *Limit Horizons & Critique: Seductions and Perils of the Nation*, 50 VILL. L. REV. 939 (2005); Martha McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars,"* 35 SETON HALL L. REV. (forthcoming 2005); Carla Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. (forthcoming 2005).

Looking to the outgroup communities from which we hale and for whom we labor, the symposium contributions also examine cultural warfare, as well as oppositional practices, in various local settings. See, e.g., Antonia Darder, *Schooling and the Empire of Capital: Unleashing the Contradictions*, 50 VILL. L. REV. 847 (2005); Anita Revilla Raza Womyn *Mujeristoria*, 50 VILL. L. REV. 799 (2005); Victor Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823 (2005).

Looking beyond the United States, these accounts additionally include national as well as international and transnational analyses of cultural warfare in various sociolegal frameworks. See, e.g., Maria Clara Dias, *Moral Dimensions of Nationalism*, 50 VILL. L. REV. 1063 (2005); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073 (2005); Berta Esperanza Hernández-Truyol, *Globalized Citizenship: Sovereignty, Security and Soul*, 50 VILL. L. REV. 1009 (2005); Angel Oquendo, *National Culture in Post-National Societies*, 50 VILL. L. REV. 963 (2005).

Finally, looking into our own profession—the professorate—these accounts similarly delve into the academic culture wars, and their significance to our work. See, e.g., Fran Ansley & Cathy Cochran, *Going On-Line with Justice Pedagogy: Four Ways of Looking at a Web Site*, 50 VILL. L. REV. 875 (2005); Sylvia Lazos, "Kulturkampf[s]" or "Fil[s] of Spite"? *Taking the Academic Culture Wars Seriously*, 35 SETON HALL L. REV. (forthcoming 2005); Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915 (2005); Mary Romero, *Revisiting Outcasts with a Sociological Imagination*, 50 VILL. L. REV. 925 (2005); Nelson Soto, *Caring and Relationships: Developing a Pedagogy of Caring*, 50 VILL. L. REV. 859 (2005).

8. This Afterword is limited to a presentation of a "mini-case study" that illustrates some basic but key recurring practices in one field of backlash activism: liberty-privacy case law. As noted below, this summary sketch builds on earlier works that collectively aim to make sense of the culture wars and their jurisprudential dimensions. For a further discussion summarizing this judicial front of the culture wars, see *infra* notes 9-13. See also Francisco Valdes, "We Are Now of the View": Backlash Kulturkampf, OutCrit Scholarship and Critical Legal Education (2005) (unpublished manuscript, on file with author) [hereinafter *We Are Now of the View*].

9. "[T]he conservative caricature of the liberal Justices pictures them just making up whatever law suited their sense of justice. The conservative promise is that their replacements will not be so free-wheeling." Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992). This campaign of course reacts to the era of "liberal activist judges"

past century in law and society. It captures both the resilience of liberalism's legacies as well as the ambitions of backlash *kulturkampf* even as it depicts a key—and unfinished—constitutional skirmish in the ongoing culture wars. At the same time, as this symposium helps to illustrate, outsider scholars have continued to experiment with traditional and non-traditional methods of scholarship to elucidate a socially just society under the antissubordination principle.<sup>10</sup> OutCrits thereby provide a fundamen-

depicted as beginning in the 1960s under Chief Justice Earl Warren, which is portrayed as a principal complaint of backslashers, who therefore "promise . . . that their replacements will not be so free-wheeling." *Id.*; see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (1979) (articulating backlash jurisprudential position in different doctrinal fields); Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 WASH. U. L.Q. 183, 189 (1999) (presenting more recent typical backlash portrayal of "liberal" jurisprudence). See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (examining now-classic expositions of this backlash portrayal). The gathering of what we now call the culture wars during the 1970s and leading up to the 1980s engendered a lively exchange over the legitimacy of the doctrinal and policy legacies that still remain, today, under backlash attack. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Thomas C. Grey, *Do We Have a Written Constitution?*, 27 STAN. L. REV. 703 (1975); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For a direct response to this backlash campaign from one of its principal "liberal" targets and describing different types of judicial activism, see J. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992).

More recently, backslashers' current and ongoing campaign to recapture and control the federal judiciary has received widespread scholarly attention, some critical and some descriptive. See generally DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 56-86 (2000); RICHARD L. PACELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* (1991); MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* (1991); HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988); Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271, 287-91 (Austin Sarat ed., 2004) [hereinafter *Antidiscrimination*] (providing extensive bibliography on general topic).

10. The antissubordination principle is generally associated with critical outsider jurisprudence, although its initial articulation originates with Owen Fiss. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154-56 (1976) (finding perpetual subordination key element of discrimination). In both its original articulation and its OutCrit elaboration, the antissubordination principle is conceived as a jurisprudential honing of the antidiscrimination principle in order to "get at" the social problems associated with domination and subjugation. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (articulating principle and reviewing Supreme Court's elaboration and application). The antidiscrimination principle, as interpreted in the form of formal equality, was made "blind" to the social and conceptual asymmetries between

tally different policy alternative to backlash and retrenchment—an alternative that will remain available to the nation when the furies of this kulturkampf have spent themselves, when the nation may once again resume its fitful march away from the identity-based structural injustices that punctuated its founding and have bedeviled it since.<sup>11</sup> As the LatCrit IX conference theme suggests, the culture wars of the past two decades provide a contemporary and concrete lens for an honest assessment of the choices effectuated through this latest effort to arrest the progress of law and society.<sup>12</sup>

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domination and subjugation, and was likewise made to regard all kinds of “discrimination” as equal, and equally suspect. This construction of antidiscrimination as remedial law and policy failed to distinguish between remedial and invidious forms of “discrimination.” This blindness in turn enabled notions of “reverse discrimination” that were used effectively to halt race-conscious remedial state actions tailored to similarly race-conscious acts of invidious discrimination. Under the antidiscrimination principle as applied, remedies to discrimination were transmuted into discrimination. The remedy became the problem because the problem was defined as “discrimination” and the cure “antidiscrimination” whereas the actual problem is subordination. To be effective, the cure must be tailored to antisubordination. *See generally* Jerome McCristal Culp, Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antisubordination).

11. This backlash kulturkampf has come to dominate law and policy during the past two decades, spawning the emergence and evolution of backlash jurisprudence to take command of Law as a key component of the ongoing culture wars. Moreover, this zeitgeist of backlash also has framed and informed the emergence and evolution of LatCrit theory during the past nine years, as well as that of critical outsider jurisprudence theories and efforts. Both OutCrit and backlash versions of post-liberal jurisprudence employ the liberal legacies of the latter part of the twentieth century. While both use the liberal legacy of formal equality as the point of departure, backlashers insist the legacy must be rolled back while OutCrits demand it be made more socially relevant. Of course, these twin jurisprudential developments have not met with the same reception: the past two decades or so have witnessed backlash scholars systematically plucked from the legal academy and other arenas by backlash politicians to enact their opinions into Law through the judicial power of the federal government. Notable backlash exemplars are Justice Antonin Scalia and Judge Robert Bork, plucked from the law faculties of the University of Chicago and Yale University, respectively, to become judicial appointees. The former remains perched on the Supreme Court while the latter was appointed to the key court of appeals in the nation’s capital, where he enacted his opinions into law until his appointment to the Supreme Court under Reagan was defeated. Bork’s defeated elevation was undertaken, and has been understood, as a key skirmish of the culture wars. *See generally* NORMAN VIERA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* (1998) (examining controversy surrounding President Reagan’s nomination of Judge Bork to succeed Justice Powell on Supreme Court). On the other hand, outsider scholars continue to elaborate a post-subordination social vision, chiefly from within the legal academy. For a collection of examples, see CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 379 (Francisco Valdes et al. eds., 2002). *See, e.g., supra* notes 1-7; *see also* Francisco Valdes, *Antidiscrimination*, *supra* note 9, at 273-76 (discussing sociolegal legacies of twentieth century liberalism).

12. This Afterword therefore should be read as one part of a larger work-in-progress elucidating backlash jurisprudence as part and parcel of the culture wars. *See generally* Valdes, *Antidiscrimination*, *supra* note 9 (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms and critical outsider

This Afterword proceeds from a critical appreciation of the alternative accounts proffered elsewhere to help explain the jurisprudential maneuvers and outcomes of the culture war rulings issued by backlash judges.<sup>13</sup> Those accounts and the perspective presented below diverge in sometimes marked ways because other accounts often emphasize familiar aspects of legal indeterminacy and judicial discretion to explain the patterns left in the jurisprudential wake of backlash adjudication. Conversely, the account unfolded here aligns more closely with the recent research into the behavior of individuals appointed to be judges. The research examines whether those behaviors produce patterns of consistency between their personal ideological preferences, as manifested in pre-appointment statements or actions, and their post-appointment adjudicatory acts. This research has given rise to the “attitudinal model” for analyzing and gauging the influence of personal predilection in formally judicial acts. It has documented a clear and stunning consistency in the convergence of political ideology and adjudicatory outcome. It depicts a convergence that effectively portrays a near-complete collapse of the idealized distinction between law or principle and politics or ideology, maintained under the “legal model” of analyzing the behavior of judicial appointees.<sup>14</sup>

This Afterword proceeds also with a wry recognition of the dangers that accompany an exposé of the human-civil rights subversion launched and orchestrated from the Supreme Court bench by kulturkampf appointees installed into those positions during the past two decades, expressly for this reactive purpose.<sup>15</sup> Yet, the benefits of critical awareness, con-

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jurisprudence—and comparing approaches to equality law and policy); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998) [hereinafter *Cultural Warriors*] (focusing on implications of cultural warfare for sexual orientation scholarship specifically and for all OutCrit scholars generally); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2005), [hereinafter *Four Score*] (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as central doctrinal terrain of social and legal retrenchment); see also Valdes, *We Are Now of the View*, *supra* note 8.

13. For a prominent and thoughtful recent example written in the context of liberty-privacy, see Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

14. For a more substantive description of this “attitudinal model” for the analysis of judicial opinions, see generally Valdes, *Antidiscrimination*, *supra* note 9. The basic conclusions of this field were more recently corroborated by a study of the cases argued during the 2002 Supreme Court term. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157 (2004) (describing model where Supreme Court Justices make decisions based on preconceived policy preferences).

15. See generally Owen Fiss, *Another Equality: Issues in Scholarship, The Origins of Fate and Antisubordination Theory* (2004), at <http://www.bepress.com/ils/iss2/art20>. In this essay, Fiss critiques the use of narrative by critical race and other OutCrit

sciousness-raising and active resistance may outweigh the fear of long term erosion of the federal judiciary's institutional legitimacy. Perhaps, the feared dangers are due more to the increasingly blatant, difficult to ignore, gyrations of backlash judges to reach their preferred results than to the public's observation of them. The gyrations are drawing increasingly pointed critical attention.<sup>16</sup> Indeed the feared dangers seem to be courted by the backslashers themselves.<sup>17</sup> In deference to the feared nihilism, however, this Afterword distinguishes between the federal judiciary as an institution and the individuals who currently wield its awesome powers

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theorists "as a substitute for the reasoned argument traditionally associated with the law." Narrativity as OutCrit method, Fiss believes, "is a way of subverting the authority of the Court [but] . . . we should criticize the Court for what it says, not subvert its authority in a deliberate or flagrant way or mock its commitment to public reasons by responding to its decisions with stories. The Third Reconstruction will need the Court." *Id.* at 24.

In this Afterword, the focus is on a substantive critique of the strategic maneuvers that pervade "what the Court says" and, more specifically, what the backlash bloc says in the name of the Court. In my view, the content of the opinions issued by this bloc in the name of the Court mock that institution's historic aspiration or "commitment to public reason" in increasingly flagrant ways that have prompted increasingly widespread recognition that the ideal of the "Rule of Law" in the United States has been put into serious question. *See, e.g., infra* note 17 and sources cited therein (including Justice Stevens's acknowledgment of this self-inflicted crisis, expressed publicly four years ago, shortly after bloc's 5-4 demand that halted all vote-counting in Florida in order to effectuate their selection of nation's next president).

16. Many scholars have pointed out the doctrinal or analytical oddities unveiled in backlash rulings. *See* Valdes, *Antidiscrimination*, *supra* note 9, at 287-89 and sources cited therein (providing bibliography of recent scholarship questioning substantive integrity of this jurisprudence). This skepticism mushroomed after the intervention of the five-member backlash bloc and their 5-4 demand that all vote counting be stopped in the 2000 presidential election. This move effectively claimed the power, for the first time in the nation's history, to select the executive. *See also* Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb 12, 2001, at 48 (noting that decision in *Bush v. Gore* litigation was "not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question" but that this time was unique because of direct meddling in electoral politics at highest level). According to one former Supreme Court clerk present during the early years of the culture wars, these charges fly between the justices themselves, as well as their chambers. *See* EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL AND FUTURE OF THE MODERN SUPREME COURT* 288-325 (1999) (noting that author clerked for Justice Blackmun in 1988 to 1989).

17. This is exemplified by the frontal assault on the integrity of "liberal" judges by the attorney general, a notorious backlash politician, who denigrated them as "ruffians in robes" because he disagreed ideologically with their rulings. *See, e.g.,* Robyn E. Blumner, *Ashcroft's Rule of Law Not Necessarily Constitutional*, SR. PETERSBURG TIMES, Nov. 18, 2001, available at [http://www.sptimes.com/News/111801/Columns/Ashcroft\\_s\\_rule\\_of\\_la.shtml](http://www.sptimes.com/News/111801/Columns/Ashcroft_s_rule_of_la.shtml) (reporting comment in context of nomination to occupy Attorney General's office following 2000 presidential selection). When the chair of the Senate Judiciary Committee queried the nominee on that commentary, Ashcroft smiled slightly and said, "I don't think it will appear in any briefs" he submits to them on behalf of the federal government. Kevin Murphy, *Ashcroft Faces More Tough Questions on Capitol Hill*, KANSAS CITY STAR, Jan. 18, 2001.



to wage backlash kulturkampf in the guise of constitutional adjudication and interpretation—especially the literal handful of individuals who form the backlash bloc on the current Supreme Court.<sup>18</sup>

## II. BOWERS, GLUCKSBERG AND LAWRENCE AS CULTURE WARS CASES: A SKETCH OF BACKLASH PATTERNS IN JURISPRUDENTIAL IDENTITY POLITICS

While the term “kulturkampf” traditionally refers to various periods in different social and political settings, in the United States at the turn of the millennium the term had come to signify the coordination of national political efforts to retrench civil rights and New Deal legacies in both social and legal terms.<sup>19</sup> These orchestrated efforts span multiple categories of identity and policy. In addition to race and ethnicity, the culture wars have focused inordinately on sex and sexuality and, conversely, on religion and morality.<sup>20</sup> It is no coincidence, therefore, that twice in sexual regula-

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18. This retrenchment is the handiwork of many backlash judges, but a “bloc” of five currently on the Supreme Court have banded together during the past decade, joined by no other justice, to become “the most activist [Supreme Court bench] in history”—they have issued in the name of that tribunal more reversals of precedent per term than any other groups of Supreme Court appointees before them. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004). The jurisprudential hard core of this “backlash bloc” on the Supreme Court consists of Justices Antonin Scalia and Clarence Thomas, with the usually reliable complicity of Chief Justice William Rehnquist in firm control of the institutional powers and prerogatives as the Chief Justice. The bloc is completed by two vacillating members, Justices Sandra Day O’Connor and Anthony Kennedy, whose support is crucial to the operation of the bloc. Because their support vacillates, the bloc is unable to operate with the success and efficiency that the appointing executives had hoped to accomplish with each of these appointments.

Nonetheless, each and every member of this bloc was appointed to power expressly as part of the backlashers’ roll-back agenda. For further discussion of these, and related judicial appointments during the Nixon, Reagan and Bush administrations, see *supra* note 12. As their manifold five to four backlash opinions in the last decade of the twentieth century aptly illustrate, this quintet operates as a bloc often enough to single-handedly enact a constitutional “counter-revolution” congruent with the social and ideological agenda of the backlash politicians who installed them into power. See Valdes, *We Are Now of the View*, *supra* note 8.

Like LatCrit theory and other jurisprudential formations, however, backlashers do not constitute a monolithic camp that marches in perfect lockstep all the time, as illustrated by the unruly dynamics of the backlash bloc on the Supreme Court in cases like *Lawrence*. See *infra* notes 65-96 and accompanying text on the *Lawrence* opinions. Indeed, when vacillating members of the bloc deviate from the script, they are excoriated by the other members for doing so, as does Justice Scalia in his *Lawrence* dissent. See also *Casey v. Planned Parenthood*, 505 U.S. 883 (1992) (dissenting backlash in case that might have overturned *Roe v. Wade*).

Thus, as with LatCrit theory and other jurisprudential references throughout this Afterword, the description of backlash lawmaking, whether by judges or others, refers to the generally cognizable patterns and formally asserted positions associated with that camp. For further discussion of this point in connection with LatCrit scholars and Latinas/os in general, see *supra* note 9.

19. See Valdes, *Cultural Warriors*, *supra* note 12, at 1427 n.70 (defining term and describing phenomenon).

20. Illustrating this point, news accounts following the 2004 electoral cycle reported that “abortion has become a prime target” of “Democratic strategists and

tion cases, Justice Antonin Scalia, has invoked the notion of “kulturkampf” to deride the Court’s decisions protecting a vulnerable group from social and legal subordination through raw exercises of majoritarian might. Dissenting from *Romer v. Evans*,<sup>21</sup> and again from *Lawrence v. Texas*,<sup>22</sup> he ridicules the majority’s analysis and holding as mere participation in the “culture wars” sweeping the United States during the last quarter of the twentieth century. In doing so, Justice Scalia reminds us all of the times in which we live, the context in which these cases have been litigated and adjudicated, and the zeitgeist under which critical outsider jurisprudence came to be.

The rise of today’s culture wars go back to the 1970s and 1980s, when the liberal antidiscrimination initiatives of earlier decades became increasingly contested.<sup>23</sup> But the moment of their official declaration occurred in 1992, from the podium of the Republican National Convention, when presidential contender Patrick Buchanan declared “cultural war” for the

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lawmakers quietly” as they “discuss how to straddle the nation’s Red-Blue divide” and that they have concluded that the “issue and the message need to be completely rethought” because “along with gay marriage, abortion is at the epicenter of the culture wars, another example used by Republicans to highlight the Democrats’ supposed moral relativism.” Debra Rosenberg, *Anxiety Over Abortion: Pro-Choice Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the Polls*, NEWSWEEK, Dec. 20, 2004, at 38 (reporting conclusions of this reassessment were espoused and endorsed by that year’s party standard-bearer, John Kerry); see also Richard Lacayo, *Abortion: The Future Is Already Here*, TIME, May 4, 1992, at 27 (observing that more than decade ago much of formal constitutional right to reproductive choice had been eroded in practice by constant and multifarious backlash assaults aimed at *Roe v. Wade*). Whether or not these particular conclusions are sound, they serve to illustrate how sex and sexuality, along with race, nationality and ethnicity, have been positioned at the “epicenter” of backlash kulturkampf. See generally Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427 (2004).

21. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). In *Romer*, the Court considered a constitutional amendment to the state charter adopted by direct statewide referendum only a few years earlier. The amendment had demarcated “sexual orientation” as an area of antidiscrimination lawmaking distinct from all other civil rights categories. Amendment Two preempted municipal and local governments from enacting local antidiscrimination laws that embraced sexual orientation, making it impossible to include sexual minorities in antidiscrimination legislation that covered other traditionally subordinated social groups on the basis of racial, ethnic, gendered, religious and other kinds of identities. *Id.* at 637. Under Amendment Two, advocates of civil rights laws based on minority sexual orientation faced unique political obstacles, prompting both the state and federal supreme courts to hold that a state majority cannot legislate a categorical exclusion of a minority and its interests from the mainstream of society based on the majority’s “animosity toward the class of persons affected” or toward its perceived (or actual) way of life. *Id.* at 634.

22. 539 U.S. 558, 586 (2003) (Scalia J., dissenting). For a further discussion on the facts and ruling in *Lawrence*, see *infra* notes 64-66 and accompanying text.

23. See Valdes, *Antidiscrimination*, *supra* note 9, at 276-82 (comparing and contrasting these two jurisprudential camps and their positions vis-à-vis culture wars).

"soul of America."<sup>24</sup> Since then, the invocation of "cultural war" to explain and motivate political action against anything labeled "liberal" has taken place repeatedly.<sup>25</sup> This kulturkampf of backlash is not, however, a simple case of rough-and-tumble politics as usual, wherein self-interested "factions" are expected to jockey for social and economic goods. Rather, this multi-year phenomenon is a concerted and multi-pronged campaign expressly for the "soul" of the nation.<sup>26</sup> The named and targeted "enemy" consistently has been one or more of the nation's historically marginalized and still-vulnerable social groups: racial and ethnic minorities, women of the "feminist" type, poor persons of all colors, consumers, environmentalists, workers, queer communities and sexual minorities, immigrants from the South and East and others.<sup>27</sup> Indeed, the overarching pattern of back-

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24. For contemporary news accounts reporting this remarkable declaration, see Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans,* CHI. TRIB., Oct. 28, 1992, at C1. For a more substantive elaboration of cultural warfare in this context, see JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994).

Since that formal declaration, this social conflict has been waged with a vengeance to "take back" the civil rights gains of the past century in the name of the "angry white male." See, e.g., Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race and Issues in the 1994 Elections*, in MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT (Philip A. Klinkner ed., 1996).

25. The term's usage in law and society thus marks and reflects the mounting pursuit and awareness of the backlash politics that animate this cultural warfare. In 1980, the term was used in public newspapers, magazines and related media four times; in 1990, seventy-six times; and in 1992, the year of formal declaration of a cultural war, 575 times. See Valdes, *Antidiscrimination*, *supra* note 9, at 283.

26. The dynamics of backlash kulturkampf point to three interactive and mutually-reinforcing "fronts" or "prongs" of attack: (1) training accumulated or entrenched resources to prevail in majoritarian contests and take control of public policy, both in the form of representative elections and "direct" referendum; (2) leveraging success in the first prong additionally to pack the federal courts with ideological appointees committed to reversing despised precedents, undoing "liberal" legislation, and shielding backlash policymaking from judicial scrutiny; and (3) turning to the spending power, which is used in tandem with the other two prongs, to "starve" social lifelines to vulnerable groups, especially when the first two prongs fail to undo or reverse "liberal" legacies. See Valdes, *Cultural Warriors*, *supra* note 12, at 1434-43 (outlining these "prongs"). See generally Valdes, *We Are Now of the View*, *supra* note 8 (expanding on analysis).

27. Plainly, this kulturkampf of retrenchment seriously and detrimentally affects many if not all outgroups. The culture wars find "different" groups positioned "differently" vis-à-vis liberty-privacy and formal equality and vis-à-vis key thematic issues, such as democracy and judicial review, or antidiscrimination and anti/federalism, and thus vis-à-vis their formal and actual retrenchment through backlash. For instance, with sexual minorities the tactic is refusal recognition of formal equality, whereas with racial or ethnic minorities the tactic is the neutralization of formal equality to deny substantive or functional equality. These differentials mean that the aspects or techniques of cultural warfare have been tailored for and directed at "different" groups in group-specific ways. Ways that account for each group's standing in relationship both to formal law and to social reality. See, e.g., Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Pro-*

lash jurisprudence, as part and parcel of these culture wars, has been the pursuit of a self-subscribed "anti-antidiscrimination agenda" under the guise of principled adjudication.<sup>28</sup> In effect, this agenda amounts to a kind of "cultural cleansing" that, in the name of "history and tradition," will leave the purified society looking and feeling like the 1780s as much as politically and physically possible.<sup>29</sup>

*position 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through use of proposition system in that state); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (deconstruction racialized political dynamics of that early Proposition); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-58 (1995) (analyzing racial rhetoric and politics of Proposition 187). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing identity politics and social consequences of recent legal "reforms").

28. See Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating current judges' manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-antidiscrimination political agenda); see also Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Fiss, *supra* note 9; Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984). See generally Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947; William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TULANE L. REV. 1485 (1990) (focusing on retrenchment in that key term of Supreme Court); Charles R. Lawrence, III, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants).

29. As illustrated by the mini-case study, backlashers' constrictive use of history and tradition is coupled with the intonations of majoritarian democracy that are often strategically employed in backlash jurisprudence. The line goes something like this: judges are ill-equipped to divine "new rights" and indeed "come closest to illegitimacy" when striving to do so. Thus, judges should leave in place the "presumed" policy preferences of the majority unless the judges are able to find specific constitutional text on point, or a specifically-framed history and tradition to fit the facts of the case. Because constitutional text is infamously brief, abstract and ambiguous, the backlash search for specific text is usually negative. By employing the most exacting approach to defining the relevant history or tradition, backlash judges help to ensure a negative outcome via this methodology. See

In short, backlash kulturkampf—including its jurisprudential forms—combines identity politics with public policy. Backlash politics and jurisprudence aim to reconsolidate the formal and cultural hegemony of the original immigrants to these lands, and of their successors-in-interest. The nation's multiple diverse social outgroups are the prime targets of the backlash take-backs. In this overarching and variegated kulturkampf, sex and sexuality, along with religion, race, nationality and ethnicity, often-times have been at the epicenter of fury. The trinity of cases spanning the past three decades formed by *Bowers v. Hardwick*<sup>30</sup> in 1986, *Washington v. Glucksberg*<sup>31</sup> in 1997, and *Lawrence* in 2003 provide an abbreviated mini-case study for a critical deconstruction of some key patterns and basic politics that shape backlash jurisprudence. This trio of cases illustrates how today's judicial appointees wield the federal judicial power to turn backlash politics into backlash jurisprudence.

A. *From Hardwick v. Bowers to Bowers v. Hardwick: The Arrest of the Law*

In this litigation Michael Hardwick and a cross-sexed couple challenged a Georgia statute criminalizing “any sexual act involving the sex

*infra* notes 30-64 and accompanying text on *Bowers* and *Glucksberg*. Under this analytical scheme, nominally democratic acts of the relevant majority—in this instance the hetero/sexual majority—become automatically self-justifying. Using entrenched power, status and wealth amassed during the decades and generations of de jure patriarchy and white supremacy, the in-groups established by the original immigrants thus are able structurally to dominate both the contents of history and tradition as well as the potential for “democratic” departures from them. For a further discussion on history, tradition and majoritarianism, see *infra* notes 67-95 and accompanying text. Consequently, the social and cultural effects of this methodology serve to privilege “original” arrangements emplaced throughout society at large based on social identities and ownership of property. These arrangements of course favored the propertied white male elites of the colonial period, which, indeed, were “the people” permitted to participate fully in the political decision-making processes used during those times to impose the social, economic and political structures that, now, are hallowed strategically by backslashers as neutral kinds of history and tradition to wage cultural warfare against the “traditionally” subordinated groups of this country. See *infra* note 81 (discussing suffrage and political participation in country's formative years). Thus, history and tradition become code terms for past and self-serving choices regarding “values” that backslashers now say bind us all in perpetuity, both formally and structurally, regardless of the constitutional lessons that later generations might draw, as did the framers, from social experience or evolution. For a further discussion of framers' adaptation of views from the revolutionary to the “critical” period, which caused them to structure “democracy” in fundamentally different terms as a result of the lessons they drew from the latter period, see *infra* notes 72-76, 102 and accompanying text. Over time, the likely if not inevitable social and cultural consequences of backlash methodology is to reverse multiculturalism in the distribution of social and formal powers, and revert to a more homogenized structuring of power—an artificial homogeneity that, despite conclusory backlash claims to the contrary, are formally at odds with the original intent of key framers in favor of a heterogeneous society. For a further discussion on original federalist theories regarding the Constitution and system they were designing, see *infra* note 102.

30. 478 U.S. 186, 190 (1986).

31. 521 U.S. 702 (1997).

organs of one person and the mouth or anus of another.”<sup>32</sup> Foreshadowing the Supreme Court’s belated self-correction in *Lawrence*, the Eleventh Circuit’s ruling in *Bowers* correctly concluded that liberty-privacy rights do not turn on identities, marital status or procreational intent, a holding that followed existing precedent.<sup>33</sup> Yet, when the case arrived at the steps of the Supreme Court in the mid-1980s, the consequences of backlash kulturkampf in the politics of federal judicial appointments during the previous decade came sharply into view: four of the five justices in the bare *Bowers* majority were installed into power by politicians who explicitly voiced their use of judicial appointments to cabin civil rights and expand “states rights” through a strategic application of “strict construction” of federal powers in the protection of individual rights and liberties.<sup>34</sup>

Those appointments generated a scandalously unsound decision employing three principal maneuvers that converged backlash politics with constitutional jurisprudence: (1) re-framing the plaintiff’s complaint to focus on “homosexual sodomy” despite the statute’s application to cross-sex sodomy; (2) invoking history and tradition to preclude “judicial activism” in liberty-privacy jurisprudence; and (3) emphasizing the need for judicial deference to “democracy” and the “presumed” moral beliefs enacted into law through majoritarian politics. Along the way, the five justices who ruled the day in *Bowers* created the jurisprudential anomaly entrenching formal inequality based on sexual orientation (the same inequality that *Lawrence* formally rejected seventeen years later).<sup>35</sup> Under the *Bowers*

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32. *Bowers*, 478 U.S. at 188 n.1. The statute completely banned both homosexual and heterosexual versions of intimacy other than “traditional” sexual intercourse. For a widely noted account of this case, see generally PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 379-403 (1988) (relaying personal accounts of *Bowers* case).

33. See Valdes, *Four Score*, *supra* note 12. Perhaps the notion of “self correction” must be qualified, given the ways in which *Lawrence* and its predecessors exclude jurisprudential ambivalence, which in turn enables backlashing judges and politicians to attempt to cast liberty-privacy as a “flattened-out collection of protected acts” rather than a coherent demarcation of autonomy for individuals that majoritarian tastes cannot outlaw. See *id.*

34. The four were: Burger (Nixon), Rehnquist (Nixon), Powell (Nixon) and O’Connor (Reagan). For a review of judicial appointments and backlash kulturkampf, see Valdes, *Cultural Warriors*, *supra* note 12, at 1440-43 and sources cited therein (discussing impact of judicial appointments on kulturkampf); see also *supra* notes 9-12 and accompanying text (discussing same).

35. Because *Bowers* expressly purports to “accept” the *Griswold* line of precedents even as it works to confine them, the sum of the liberty-privacy precedents after *Bowers* could only mean that the relevant (heterosexual) majority now could impose its majoritarian sense of moralism on the sole minority group that *Bowers* excluded from the Constitution’s protection—non-heterosexuals. Today, despite *Lawrence*, the heterosexualist status quo blessed in *Bowers* continues to operate fully in law and society. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family*, 358 F.3d 804, 816 (11th Cir. 2004) (citing *Lawrence* but nevertheless upholding outright ban on “homosexual” individuals’ capacity to adopt children under Florida law); *In Re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (citing *Lawrence* but holding

anomaly, a relevant majority—the heterosexual majority—was positively licensed to deploy state power to outlaw selectively the similar conduct of the correlate minority; *Bowers*'s equality anomaly effectively made sodomy laws of general application impossible.<sup>36</sup> Moreover, *Bowers* enabled and perhaps even encouraged heterosexist majorities to pass oppressive laws that constitutionally could not reach them—even if the penalized conduct was otherwise similar, perhaps even identical, to that of their homosexual counterparts.

The majority opinion in *Bowers* was written by Justice White and joined by four other justices. The Court framed the case in two parts, both of which are key to the jurisprudence of backlash that *Bowers* helped set into motion. The first part centered on cultural notions of homosexual identity apparently harbored by the quintet of justices in the *Bowers* majority. These notions formed the core of the Court's conclusion. The second part of the opinion focused attention on institutional concerns over judicial legitimacy in Constitutional interpretation in a society dedicated to democracy, and labors to provide additional rationale for their conclusions. The first part enabled the justices to bootstrap into law their social perceptions and prejudices along the identity-rooted fault lines of the culture wars while the second became a textbook example of, and precedent for, future jurisprudential plays of this sort in pursuit of backlash kulturkampf.<sup>37</sup> The first part of *Bowers*'s ruling focused on whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” while the second focused itself on “the limits of the Court's role in carrying out its constitutional mandate.”<sup>38</sup>

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that Canadian same-sex marriage could be denied effect in United States bankruptcy proceedings); *Kansas v. Limon*, 83 P.3d 229, 234 (Kan. Ct. App. 2004) (citing *Lawrence* holding that Arkansas could impose differential punishment on minors for prohibited sexual relations on grounds that *Lawrence* did not extend to children). In each instance, the judges writing these opinions opted to emphasize the constrictive language in *Lawrence* rather than its expansive passages, or to distinguish the cases legally and factually. These cases vividly illustrate the ways in which *Lawrence* can be reduced to nothing despite its reasoning and outcome. This possibility of circumvention exists regardless of the eighty years of jurisprudence preceding *Lawrence*, beginning with *Meyers* in 1923. Indeed, the five justices in *Bowers* used that case to attempt a halt to, if not to incite a reversal of, liberty-privacy cases under the Fourteenth Amendment's Due Process Clause. See Valdes, *Four Score*, *supra* note 12 (tracing eighty years of liberty-privacy Supreme Court opinions from *Meyers* to *Lawrence*).

36. Without laws of general and equal application, the legal possibility—and constitutional requirement—of equal protection demanded by the Fourteenth Amendment is positively frustrated, ironically, by judicial fiat. See U.S. CONST. amend. XIV, § 2 (stating Equal Protection Clause).

37. See *supra* notes 8-9, 12-13, 17-18, 20, 23-24 and accompanying text (explaining politics of culture war); see also *infra* notes 45-48 and accompanying text (criticizing identity-driven approach taken in *Bowers*'s opinion).

38. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

Justice White's majority opinion began by re-describing the *Griswold v. Connecticut*<sup>39</sup> line of liberty-privacy precedents, aiming specifically to "register disagreement" with the Eleventh Circuit's understanding of those precedential cases. But the Court's approach significantly differed from the due process cases: *Meyer v. Nebraska*,<sup>40</sup> *Griswold*, *Eisenstadt v. Baird*<sup>41</sup> and *Carey v. Population Services International*<sup>42</sup> all had explained due process as a coherent yet flexible doctrine that was based chiefly on constitutional language but never had attempted to delimit or mark the "outer limits" of liberty-privacy. By contrast, the *Bowers* majority summarily recast these cases, in brief descriptive capsules, as atomized examples of discrete "decisions" and "isolated points" (or "dots")—in other words, merely an ad hoc and "flattened out collection" of acts—to which protections had somehow attached, perhaps through nothing more than mere judicial whim.<sup>43</sup> In a fairly aggressive effort to arrest the further development of liberty-privacy law, the *Bowers* quintet denied what these controlling rulings expressly and repeatedly had delineated.<sup>44</sup>

After that formal (and superficial) acknowledgement of precedent, Justice White's opinion summarily (and disingenuously) asserted that:

[a]ccepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . . Moreover, any claim that these cases nevertheless stand for [this kind of] proposition . . . is unsupportable.<sup>45</sup>

In the paragraphs following these identity-inflected assertions, the Court generously sprinkled its opinion with other factually or substantively erroneous conclusions regarding history, tradition and precedent.<sup>46</sup> By the end of the opinion's first part, the substantive issues presented by that case—at least as the quintet had selectively chosen to fix them in identity-

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39. 381 U.S. 479 (1965).

40. 262 U.S. 390 (2004).

41. 405 U.S. 438 (1972).

42. 431 U.S. 678 (1977).

43. See *Bowers*, 478 U.S. at 190 (summarizing superficially preceding case law addressing liberty-privacy issues under Fourteenth Amendment).

44. See Valdes, *Four Score*, *supra* note 12 (tracking this point through *Meyers* line of liberty-privacy line of cases).

45. *Bowers*, 478 U.S. at 190-91.

46. For an early and notable example of legal scholarship documenting the historical errors asserted by the majority and the Burger concurrence, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988).



based terms—had raised, in their view, “at best, facetious” claims to equal privacy and liberty.<sup>47</sup>

To accomplish this outcome, the *Bowers* quintet proffered a strategic assertion that has come to characterize backlash jurisprudence: the Court claimed in the second part of the opinion that fears of institutional legitimacy also prevented their recognition of equal privacy rights under the Fourteenth Amendment. The majority stated that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>48</sup> With this facile assertion, the *Bowers* justices strongly implied that liberty-privacy was an illegitimate judicial fabrication rather than an individual right rooted “in the language or design of the Constitution.”<sup>49</sup> The Court characterized its ruling as an example of restrained and hence “principled” adjudication, presumably in contrast to the “liberal” precedents the Court inherited from its “activist” and unprincipled predecessors. Moreover, as if to make the identity politics underlying the Court’s view perfectly clear, Chief Justice Burger not only joined the White opinion but also filed a separate concurrence “to underscore [his] view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.”<sup>50</sup> With the *Bowers*

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47. Later in the opinion, the majority turns to privacy’s spatial dimension as it occurred in that case—the invasion of the bedroom. Rebuffing the spatial dimensions of privacy with equal alacrity, the *Bowers* quintet casually rejected the relevance of *Stanley v. Georgia*, 394 U.S. 557 (1969), with the formalistic note that *Stanley* had been “firmly grounded in the First Amendment” whereas “homosexual sodomy” was not similarly grounded in the text or design of the Constitution because they themselves had just declared so a few paragraphs earlier in that remarkable opinion. See *Bowers*, 478 U.S. at 190 (distinguishing *Bowers* from *Stanley*). Thus, the only way that the spatial dimension of privacy under *Bowers*’s facts could be sustained, the quintet asserted, was to confer special rights on homosexual at-home activity “by [judicial] fiat.” *Id.* at 195. In their own words, and without any sense of irony, the opinion explained that, “it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.” *Id.* at 195-96. In so doing, the *Bowers* Court also overlooked the deeply rooted relevance of privacy’s spatial dimension in United States law under both the Fourteenth and Fourth Amendments: landmark cases like *Griswold* explicitly relied on both. See Valdes, *Four Score*, *supra* note 12.

48. *Bowers*, 478 U.S. at 194.

49. *Id.*

50. *Id.* at 196 (Burger, J., concurring). After much flipping and flopping, Justice Powell also concurred under the apparent sway of a Mormon clerk with an avid interest in the outcome of this case, but with a proviso that the Eighth Amendment’s prohibition against cruel and unusual punishment might proscribe severe sentences for private, consensual acts of oral or anal sex. See *id.* at 197 (Powell, J., concurring). The clerk’s interest and influence in the outcome of Michael Hardwick’s case is recounted in Tribe, *supra* note 13, at 1953-55 (citing private memorandum between Powell and clerk); see also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521-24 (1994) (describing Powell’s attitudinal oscillation before reaching conclusion in *Bowers*). The story concludes with Powell’s courageous and candid post-retirement admission before a law student forum at New York University

majority's decision in 1986, the meaning of "privacy" as a component of "liberty" was effectively thrown wide open to pave the way for a backlash reordering of jurisprudential developments that had begun in 1923.

As was clear to many observers back then, and has become even more so in the intervening years, those five justices used *Bowers* mainly to bootstrap their own prejudices into the annals of constitutional law.<sup>51</sup> The effect of this fiat was to engineer a roll back in the evolution of liberty-privacy jurisprudence specifically, and of civil rights law in general—as scholars pointed out immediately and *Lawrence* finally acknowledged. In *Bowers*, the Court asserted conveniently false "history" in its opinion to foist on posterity those five justices' personal predilections.<sup>52</sup> Rather than adjudicate justiciable issues as framed by the litigants and record before them, those five justices willfully reached out from their privileged perches to recycle homophobic superstitions from the witch-hunt days of our nation and its antecedents. Brushing aside precedents like *Griswold* and *Carey*, and claiming in conclusory fashion that Michael Hardwick's claim was "facetious" based on personal and societal prejudice, the *Bowers* quintet at-

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that he likely had erred in that fateful last-minute vote switch. See Anand Agneshwar, *Powell on Sodomy: Ex-Justice Says He May Have Been Wrong*, NAT'L. L.J. Nov. 5, 1990, at 3 (discussing Powell's statement that *Bowers* may have been wrongly decided); Aaron Epstein, *Ex-Justice Says He Erred in '86 Gay Ruling*, MIAMI HERALD, Oct. 26, 1990, at 19A (recounting Justice Powell's doubt concerning correctness of ruling in *Bowers*); *Ex-Justice Powell Regrets '86 Ruling on Gays*, S.F. CHRON., Oct. 30, 1990, at A4 (noting Powell's admitted regret over joining majority opinion in *Bowers*). The four remaining justices dissented through an opinion authored by Justice Blackmun. The dissent echoed the Eleventh Circuit's analysis and criticized the majority's single-minded obsession with social identities while gliding over the facially sweeping provisions of the statute. See *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting). Justice Stevens also filed a separate dissent on behalf of himself and Justices Brennan and Marshall. Stevens noted explicitly that *Bowers*'s judicial approval of the selective application of this facially sweeping criminal statute produced a serious equality anomaly under the Equal Protection Clause of the Fourteenth Amendment. Because privacy rights would henceforth be deemed formally unequal based on the sex or sexual orientation of the bodies involved in a coupling, the Stevens dissent presciently warned, *Bowers* created a glaring and logically untenable stratification of liberty-privacy rights already explicitly recognized for all "individuals" in *Meyer*, *Griswold* and progeny. This constituted an undue and belated jurisprudential anomaly in which identical acts are to be deemed constitutionally protected or not based solely on classifications like "heterosexual" or "homosexual." See *id.* at 214 (Stevens, J., dissenting).

51. Specifically and notably, Justice Stevens spelled it out back in 1986. See *supra* note 50 (discussing Stevens's dissent in *Bowers*).

52. See, e.g., Goldstein, *supra* note 46 (discussing Court's use of history to mask justices' personal prejudice). Embraced mostly by backslashers, the *Bowers* ruling had been greeted with overwhelming skepticism or worse for this and similar reasons, as the *Lawrence* majority expressly noted: "In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions." *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). For one such contemporaneous criticism, see generally Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (attributing *Bowers* to personal predilections of justices comprising majority).

tempted to throw into permanent doctrinal disarray the steady and relatively consistent evolution of liberty-privacy jurisprudence that had progressed over the better part of the preceding century.<sup>53</sup> For nearly two decades, until the *Lawrence* repudiation, those justices managed to transmute their personal views and ideological values into the form of constitutional law in order to arrest the development of liberty-privacy in ways that can never be fully measured. A full decade later, with backlash kulturkampf ascending, the justices attempted to cement *Bowers*'s anomalous and "flattened out" view of liberty-privacy.<sup>54</sup>

### B. Glucksberg: *Entrenching Bowers, Promoting Backlash*

In 1997, backlash politics prevailed again in *Glucksberg*. This case involved a Washington statute that criminalized providing information or assistance to a competent but terminally ill adult who wished to expedite, rather than retard, his or her inevitable death. Physicians and terminally ill competent adults in the state challenged the statute under the Fourteenth Amendment's protection of liberty, claiming that individuals have a "right to control" their final encounter with life and to "choose a humane, dignified death" over more painful or prolonged options coerced formally or constructively by medical regimes or family preferences.<sup>55</sup> The District Court struck down the statute and the decision was affirmed en banc by the Ninth Circuit.<sup>56</sup> When the case reached the Supreme Court, the same bloc of five justices who banded together during the early-to-mid 1990s to implement backlash jurisprudence from that bench, joined in yet another five to four opinion that overturned the opinions below and once again scrambled familiar jurisprudential lines to delimit individual rights and liberties. Issued by Chief Justice Rehnquist, the *Glucksberg* opinion is a textbook rendition of backlash jurisprudence. It is instructive in understanding backlash jurisprudence both because it was *Bowers*'s cousin in the key area of liberty-privacy and because it epitomizes the ways and means of jurisprudential kulturkampf.

Echoing backlash pronouncements in *Bowers*, the *Glucksberg* opinion declared:

The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly ob-

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53. In one of the institutional wounds that backslashers have inflicted on the Court's legitimacy, they also erected the equality anomaly that their predecessors and the Eleventh Circuit had averted—and that Stevens had explicitly identified for them in his *Bowers* dissent. See Valdes, *Four Score*, *supra* note 12 (elaborating "equality anomaly"); see also *supra* note 50 (discussing Justice Stevens's dissent in *Bowers*).

54. See Tribe, *supra* note 13, at 132 (contrasting *Bowers*'s superficial consideration of privacy rights with previous cases that considered these rights as "reflections, in the lives of individuals and groups, of constitutional principles").

55. *Id.* at 722.

56. See *id.* at 709 (relating Ninth Circuit's en banc ruling).

served that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. . . . Second, the Court has required a "careful description" of the asserted fundamental liberty interest.<sup>57</sup>

This formulation is an exact replication of the scheme that *Bowers* endeavored in 1986 to substitute for earlier liberty-privacy rulings, including *Griswold*. This assertion aims to create the impression that *Bowers*, as opposed to *Griswold* and its progeny, represented the "established method" of substantive due process analysis in liberty-privacy cases. To do so, moreover, the *Glucksberg* quintet asserted the analytically untenable notion of a single "objectively" discernible history and tradition governing the claims framed by the plaintiffs in their pleadings. The Court's decision in this case, however, belied this supposed formal objectivity. After a journey of several pages purporting to dissect social and legal attitudes toward "suicide" (and assisted suicide) from medieval England and since, the majority concluded that history and tradition prevented judicial recognition of the right to die for those living today.<sup>58</sup> This deployment of history and tradition surrounding suicide in ostensibly neutral terms was, in effect, calculated to set into motion an analytical domino effect that predictably, if not certainly, would produce the outcome most compatible with backlash imperatives and agenda.

The *Glucksberg* opinion's insistence on framing the relevant history and tradition of attitudes surrounding suicide and assisted suicide, which was eerily reminiscent of the *Bowers* holding's one dimensional focus on "homosexual sodomy," willfully overrode the grievance voiced by the plaintiffs' in their pleadings.<sup>59</sup> It also sidestepped the analysis of the district court and en banc circuit court, which both arrived at uniform conclusions. This uniformity was at least in part due to the fact that the lower courts accepted the plaintiffs' framing of their case around the "right to die" humanely and with dignity by exercising personal "control of one's final days."<sup>60</sup> Framed as the plaintiffs' had, history and tradition surely could not bar an individual's interest in "choosing a humane and dignified death" over other possible deaths as an aspect of personal liberty. But reframing the claimed right as a decontextualized taste for "suicide," as the five *Glucksberg* justices did, foreclosed any real possibility of any outcome other than rejection of the reframed claim along the analytical lines laid down.<sup>61</sup> Having willfully interposed a reformulation of the claimed

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57. *Id.* at 703.

58. *Id.* at 711 (stating that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisted suicide").

59. See *supra* notes 55-58 and accompanying text.

60. See *Glucksberg*, 521 U.S. at 722 (citing Ninth Circuit's opinion).

61. In this strategic version of the Due Process Clause, the term "suicide" is deemed somehow more specific than "control over one's final days" and therefore the justices' preferred version of the plaintiff's actual claim was unilaterally substi-

right to engineer their rejection of it, the *Glucksberg* five intoned not only history and tradition, but for good measure also added formal democracy and states' rights to conclude that they simply could not uphold the two rulings of the federal judges who had heard the case before them: implicitly casting the lower courts' rulings as illegitimate overreaching, the *Glucksberg* quintet concluded their opinion with the assertion that upholding the lower courts would require them to "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."<sup>62</sup>

Described in *Glucksberg* as a "restrained methodology" without any apparent sense of Orwellian irony,<sup>63</sup> this kind of analytical maneuvering thus is purportedly demanded by the need to discipline judicial will or "activism."<sup>64</sup> Akin to the same analytical maneuvers they undertook in *Bowers* a decade earlier, the backlash assertion here again was that unelected federal judges must defer to "tradition and history" and to the "presumed belief" of the majority—or risk institutional illegitimacy.<sup>65</sup> In *Glucksberg*, this assertion appears as follows: "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court . . . we have a tradition of carefully formulating the interest at stake in substantive due process cases."<sup>66</sup> To soothe us further, the backlash bloc in their *Glucksberg* opinion also added, again with no apparent sense of Orwellian irony: "This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review."<sup>67</sup> But, as with so many of the culture war rulings issued by the backlash bloc during the past decade or so, this somber assertion belied its own strategic selectivity.<sup>68</sup> When *Lawrence* was decided six terms later, in 2003, the same justices made plain that *Bowers* was, and always had been, flat-out

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tuted, at the very last stage of the litigation, for the substantive claim that was actually adjudicated by the courts in that case up to that moment. Of course, as an elementary point, judicial reframing of claims and issues at the final appellate stage of a case is improper; in this particular instance, it is not only because appellate judges are supposed to adjudicate claims as actually presented and litigated, rather than as they belatedly reinvent, but also because this use of history and tradition to deny Fourteenth Amendment protection of claimed liberty interests runs counter to the proper use of that source—as a positive supplement to constitutional text—in the *Meyer-Griswold* line of cases that since 1923 have defined this area of constitutional law. See Valdes, *Four Score*, *supra* note 12 (tracing role of history and tradition in liberty-privacy Supreme Court opinions since 1920s).

62. *Glucksberg*, 521 U.S. at 723.

63. See *id.* at 721 (describing Due Process clause analysis and history and tradition).

64. See *supra* note 9 (describing backlash denunciations of judicial will and "liberal activism").

65. For a further discussion on *Bowers* and the underlying assumptions the justices held, see *supra* notes 30-54 and accompanying text.

66. *Glucksberg*, 521 U.S. at 720-22.

67. *Id.* at 722.

68. And, as in the case of *Bowers*, the decision quickly generated much scholarly commentary. See *id.* at 722 n.17 (citing sources).

wrong. By logical necessary extension—though they did not so intimate—so should be the backlash methodology that *Bowers* advocated and that *Glucksberg* sought to entrench.

C. Lawrence v. Texas: *Expunging Bowers, Breaking Backlash?*

In *Lawrence*, the justices invalidated Texas's sodomy statute, which, unlike Georgia's sodomy statute, textually singled out same-sexed intimacy for state suppression and criminal punishment but left untouched the same acts if performed by cross-sexed couplings. As in *Bowers*, the two men's intimacies took place in their own home.<sup>69</sup> In *Lawrence*, five of the current justices based their conclusion on the liberty text of the Fourteenth Amendment, as it had been interpreted for over eight decades by succeeding generations of Supreme Court appointees since the 1923 ruling in *Meyer*.<sup>70</sup> In doing so, the justices unequivocally repudiated *Bowers* and acknowledged that, not only was *Bowers* wrong by contemporary standards, but it was in fact wrong at its inception. To arrive at this substantive conclusion, the Court engaged a critical and realist approach to constitutional analysis that stands in marked contrast to the dictates and techniques of backlash jurisprudence, and that thereby may well help to deliver four enduring benefits: (1) helping to pierce the veils of formal democracy as automatic self-justification for exercises of public power; (2) downsizing the role of history and tradition specifically as a limitation on the scope of liberty-privacy under the Fourteenth Amendment; (3) reviving antisubordination values as substantive constitutional principle; and (4) centering critical realism as constitutional method. Because they help to counter several hallmark features of backlash jurisprudence and kulturkampf, each of these four potential benefits of the *Lawrence* ruling can work against backlash politics in the explication of constitutional law. These, therefore, are key points to keep in mind as OutCrit scholars prepare the groundwork for the day when the current fits of backlash can be relegated, finally, to yet another chapter of sorry legal history.

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69. See *Lawrence v. Texas*, 539 U.S. 558, 562-63 (2003) (stating factual background of case). Justice Sandra Day O'Connor concurred in the result, but based her ruling on equal protection grounds, which would have left *Bowers* intact. Justice O'Connor formed part of the *Bowers* quintet and was apparently reluctant to admit error despite the conceptually untenable doctrinal anomaly that *Bowers* had created. See Valdes, *Four Score*, *supra* note 12. In this reluctance, O'Connor stands in stark contrast to the candor of another justice in that quintet, Lewis Powell. For a further discussion on Lewis Powell and his confession of probable error in casting the decisive fifth vote in 1986, see *supra* note 50 and sources cited therein.

70. See generally Daniel Gordon, *Gay Rights, Dangerous Foreign Law, and American Civil Procedure*, 35 McGEORGE L. REV. 685, 687-91 (providing brief historical overview of liberty concept in relation to Fourteenth Amendment and *Lawrence*).

1. *Closing Down Bowers's Reign of Tyranny: Majoritarian Moralisms and Nominal Democracy*

As noted earlier, the *Bowers* justices attempted to enshrine "presumed" majoritarian moralism as a self-justifying basis for lawmaking: the *Bowers* majority proffered judicial deference to the "presumed belief of a majority of the electorate in Georgia" as an institutional rationale for upholding the selective application of sodomy statutes.<sup>71</sup> The implications of this interposition were potentially breathtaking: so long as a nominally democratic legislature enacted a statute imposing a "presumed belief" or "moral" view, it could be upheld as an expression of formal democratic lawmaking. Never before, apparently, had such a proposition based on majoritarian moralism been so blanketly asserted in the form of an opinion issued under the name of the Supreme Court.<sup>72</sup>

But the crucial immediate points that this strategic assertion conveniently overlooked were twofold. The first centers on precedent and method: the line of liberty-privacy rulings from *Meyer* in 1923 to *Griswold* in 1965 to *Carey* in 1977 demonstrated the contrary point, as they had consistently overturned acts of majoritarian moralism embodied in nominally democratic formal legislation in order to vindicate individual autonomy; this jurisprudential record hardly supported the belated assertions of the backlash bloc in 1986 and 1997.<sup>73</sup> The second conveniently overlooked point goes to the crux of the substantive claim of effectively blind deference to majoritarian moralism as the preferred method of constitutional interpretation. The license to impose majoritarian moralisms in the regulation of human sexualities on entire populations could not, in fact, be applied or enforced against majority-identified sodomites who engaged in sodomy as "married couples." Moreover, as *Carey* illustrates, this license could not even be applied or enforced against unmarried, but heterosexually-identified sodomites, including persons classified as minors. This self-exemption from equal regulation creates the necessary structural conditions for a classic exercise of democratic despotism warned against by the framers in the debates that ultimately resulted in the drafting of our Constitution—the same Constitution that the backslashers purport to interpret

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71. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

72. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1256-57 (2004) (canvassing case law to arrive at this conclusion). See generally Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998) (critiquing judicial acquiescence to majoritarian assertions of morality as self-legitimizing basis for public policy); Daniel Gordon, *Moralism, The Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 TEX. J. ON C.L. & C.R. 1 (2003) (discussing morality and moralism in culture wars context).

73. See Valdes, *Four Score*, *supra* note 12 (discussing these cases and their holdings).

with fidelity in cases such as these.<sup>74</sup> Thus, not only did established liberty-privacy precedents decided by multiple generations of judges during the twentieth century seem to foreclose this belated backlash attempt to self-justify whatever actions may be imputed by a judge to a “presumed belief” of a particular majority, but the original concerns regarding the “tyranny of the majority” that motivated and undergirded the design of the Constitution seemed to demand the very opposite.

In the state of affairs constructed by the joint operation of *Bowers* and *Griswold*’s progeny—the state of affairs noted by Justice Stevens in his *Bowers* dissent and aptly described as an “equality anomaly”—state power to regulate “sodomy” could be targeted with confidence only against “homosexual sodomy” and homosexual sodomites.<sup>75</sup> In this way, *Bowers*’s ostentatious bow to nominal democracy and formal legislation in the name of the judiciary’s institutional legitimacy perversely excited one classic fear underlying the Constitution.<sup>76</sup> That fear was the danger of self-interested despotism, or the tyranny of shifting majorities, practiced typically in the form of nominally “democratic” electoral politics, to enact legislation that

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74. For a further discussion on the framers’ concerns over majoritarian or democratic tyranny, see *infra* notes 72-76 and accompanying text.

75. For a further discussion on *Bowers*’s imposition of de jure inequality, see *supra* notes 34-35 and accompanying text.

76. This focus on institutional legitimacy, of course, combines actual institutional history, especially the 1930s activist campaign against the New Deal, with longstanding theoretical concerns over the role of judicial review in a democracy. For a further discussion on judicial activism in the 1930s and in the present, see *supra* notes 9, 19-29 and accompanying text. But the backlasher’s formulation twists the relationship between the two: federal judges are unelected and receive lifetime appointments precisely to create an independent check on majoritarian lawmaking, especially when the majority enacts burdens that apply exclusively or disproportionately to minorities. See *infra* note 78 and accompanying text (quoting Justice Jackson on this point). Such abuses of formal democracy were envisioned by the original framers of the Constitution, who responded to the threat in two ways: first, with a system of checks and balances designed to create a structural set of mechanisms preventing all factions from gaining perpetual supremacy and, second, with a substantive Bill of Rights precluding majorities from impinging on individuals or minorities. For a further discussion on antisubordination as democratic choice and constitutional mandate, see *infra* notes 95-105 and accompanying text. More to the point, majoritarian abuses of formal democracy are prohibited by the Equal Protection Clause of the Fourteenth Amendment, which helps to ensure that majoritarian lawmaking is not selectively applied. As *Romer* has made recently clear, judges are not supposed to bless abuses of power when veiled as nominal democracy. For a further discussion of *Romer*, see *supra* note 21 (discussing Court’s holding in *Romer*). In *Bowers*, however, the majority reversed the two, posing the spectre of antidemocratic judicial interference with the selective application, specifically against “homosexuals,” of the “presumed belief” of a long dead majority in Georgia that all “sodomy” is immoral. Thus, in addition to history and tradition, the *Bowers* justices claimed institutional legitimacy demanded judicial deference to “democratic” lawmaking. For a further discussion on *Bowers* and the facially neutral statute upheld there as applied, see *supra* notes 38-50 and accompanying text.



aims to “vex and oppress” minority or electorally-disempowered groups.<sup>77</sup> Indeed,

there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation.<sup>78</sup>

With this move, then, the *Bowers*’s justices constructed a constitutional straitjacket in which unjust or intrusive laws could be promulgated and enforced against disfavored “others” with a firm advance guarantee that the very same proscriptions would never burden or endanger the equivalent delights of the lawmaker and his/her “moral” majority.<sup>79</sup> A more apt example of “democratic” tyranny—and of invidious inequality—

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77. For a further discussion of how this specific formulation of the majoritarianism problem that the Constitution is designed to check is Madisonian, see *infra* note 102.

78. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

79. *Bowers* thereby not only signaled open season on sexual minorities and our social justice quests, but also proclaimed open season on the very notion of “fundamental rights” or liberties that constitutionally protects all individuals from the caprice of shifting generations and majorities. Not surprising to any alert observer, including no doubt the backlashing judges who rendered these opinions, this rather undemocratic and decidedly anti-constitutional phenomenon is precisely what followed during *Bowers*’s sixteen-year reign. In *Bowers*’s wake backlash politicians increasingly sought to target sexual minorities for discrimination in all the vital venues of the “private” and “public” spheres: employment, housing, family, public service and educational opportunities. See Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97, 111-29 (1991) (describing tax code disparities based on formal exclusion from marriage); see also *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1990) (compiling historical—and current—vulnerability of members of sexual minorities to de jure discrimination). See generally Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN’S L.J. 1 (1986) (elaborating early effort to dismantle web of detriments flowing from formal exclusion from marriage). When challenged, homophobic backlashers repeatedly—even routinely—cited *Bowers*, which in time became the bedrock of this de jure edifice. The standard judicial line to de jure discrimination during the *Bowers* period is illustrated by the infamous opinion in *Padula v. Webster*, an equal protection challenge to the FBI’s anti-gay personnel policies. See generally *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). Referring to *Bowers*’s blessing of Georgia’s sodomy statute as applied to Michael Hardwick, an appellate panel declared in this case that, “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” *Id.* at 103. If the *Bowers*’s justices were willing to bless the most “palpable discrimination” possible against sexual minorities, how could lower court judges do any less? Thus, *Bowers*’s blessing of homophobic criminal statutes under substantive due process became a justification for blessing homophobic policies and practices under equal protection.

is difficult to find in the contemporary annals of constitutional law.<sup>80</sup> *Lawrence*, at the very least, demands a stop to this blatant double standard under the color of law.

## 2. *Putting the Past in Its Place: "History and Tradition" in Constitutional Construction*

An equally important set of post-backlash points that *Lawrence* clarifies in Fourteenth Amendment jurisprudence—and which also provides another of its potential benefits—is the legitimate role of history and tradition in the constitutional interpretation of the Fourteenth Amendment. *Lawrence* clarifies the use of history and tradition to interpret Fourteenth Amendment text in three key ways that span substance and method:<sup>81</sup> (1) it casts history and tradition as positive supplements, not stingy curbs, on liberty-privacy; (2) it views history and tradition as ongoing and evolving phenomena, rather than a finite or fixed point in time during the eighteenth century or thereabouts; and (3) it contextualizes national historical evolutions and trends in comparative, transnational terms rather than in strictly insular or nationalistic frames. As with its rejection of majoritarian moralism, this clarification is intertwined with *Bowers*'s repudiation. As with its repudiation of *Bowers*, this aspect of *Lawrence* potentially helps to undercut backlash jurisprudence more broadly on both substantive and methodological levels.

### a. History and Tradition as Positive Supplement, Not Stingy Obstacle, to Rights Recognition

In the precedents from *Griswold* to *Carey*, history and tradition had been secondary sources of interpretation employed to buttress, not undercut, the textual provisions of the Fourteenth Amendment.<sup>82</sup> Until *Bowers*,

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80. See *supra* note 78 and accompanying text (quoting Justice Jackson on this point).

81. The distinction between "substance" and "method" is of course elusive and perilous. Thus, here "method" refers to the deployment of critical realism in the majority opinion to pierce through the blinding formalisms that often prompt judges to write opinions riotously at odds with lived experience. For examples of this phenomenon, see Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20-23 (analyzing this kind of doctrine-reality disjuncture in statutory and constitutional civil rights litigation). For a further discussion on critical realism in *Lawrence*, see *infra* notes 106-117 and accompanying text. Importantly, this avoidance of formalism ultimately enabled the application—and vindication—of the antisubordination principle in this case. For a further discussion on the fusion of critical realism and antisubordination normativity in *Lawrence*, see *infra* notes 96-117.

82. In "modern" times, this view was most forcibly articulated in Arthur Goldberg's concurrence for three of the justices in *Griswold*, which combined the Ninth Amendment's express protection of unenumerated constitutional rights "retained by the people" with "traditions and conscience" to help judges discern the contours of such unenumerated rights. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). This same basic and positive approach,

history and tradition had been used mainly as secondary sources of textual interpretation to bolster judicial protection of individual rights against majoritarian lawmaking in the name of moralism. During the second half of the past century, this function was true in *Griswold*, *Eisenstadt*, *Roe v. Wade*<sup>83</sup> and *Carey*; before then, during the century's first half, it was also true in *Pierce v. Society of Sisters*<sup>84</sup> and *Meyer*.<sup>85</sup> More on point, it was true in the Eleventh Circuit's understanding of Bowers's claim—in light of these precedents—and in the lower courts' rulings in *Glucksberg*.<sup>86</sup> It was apparently true all around until the five justices forming the bare *Bowers* and *Glucksberg* majorities weighed in, ostensibly relying on history and tradition to fix constitutional rights and liberties to a time when, by law, only white (propertied) men had the social opportunity to forge the practices and norms that, today, are retrospectively exalted as self-justifying "traditions" binding us all forever.<sup>87</sup> In this effort, backlash judges tell us that history and tradition dictate the modern-day oppression of sexual and other minorities or identities, and not the internalized homophobia of individuals

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however, is also reflected in the opinions of numerous judges adjudicating privacy cases. See Valdes, *Four Score*, *supra* note 12. Of them all, perhaps the Harlan concurrence in *Griswold* is most illuminating. There, Harlan forcefully invoked history and tradition both as a tether of judicial interpretations of the Fourteenth Amendment *as well as* a means of liberating privacy from the specific provisions of the Bill of Rights and their incorporation into the Fourteenth Amendment via the Due Process Clause. See *Griswold*, 381 U.S. at 499 (Harlan, J., concurring). In the Harlan concurrence, the dangers of rights constriction against the individual flow from the vagaries of textual interpretation, and history and tradition serve to guard against this dangerous potential for a judicial text-based constriction of liberty-privacy. See *id.* Under either account, history and tradition properly operate in conjunction with text-based concepts to protect, not constrict, individual rights through judicial action. For the original and widely noted articulation of this basically expansive approach to liberty-privacy, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (explaining that "[t]his development of the law" due to "the advance of civilization" through "thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth enabled the judges to afford the requisite protection, without the interposition of the legislature"). For a contemporary review and analysis, presented nearly a century later, see generally Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (elaborating notion of personhood in relationship to privacy doctrine).

83. 410 U.S. 113 (1973).

84. 268 U.S. 652 (1925).

85. See Valdes, *Four Score*, *supra* note 12 (surveying cases from *Meyer* to *Pierce* to *Bowers*).

86. See *supra* notes 30-54 and accompanying text (discussing *Bowers*).

87. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978) (surveying property-and-identity based structures of inclusion or exclusion that limited exercise of political rights in formative years of this country and legal system); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (same); see also *supra* note 29 (discussing property and its relation to Constitution). For a further discussion on the backlashers' use of history and tradition to recycle the prevalent biases of that era in perpetuity as formal constitutional doctrine, see *supra* notes 47-50 and accompanying text.

with awesome power and names like Byron White, Warren Burger, William Rehnquist, Sandra Day O'Connor and others who chose to sign onto the infamous ruling in *Bowers* or its progeny. *Bowers* thus both illustrated and portended strategically rigid constructions of history and tradition conveniently tailored (though factually false) to deflect the quite foreseeable critiques of backlash rulings as mere products of their authors' cultural biases and ideological imperatives. This backlashing formulation attempted to constrict history and tradition into the most minute level of description that an active judicial imagination can concoct in order to block rights recognition.<sup>88</sup>

As *Bowers* illustrates and as *Lawrence* documents, the first problem with this bald and cavalier valorization of "history and tradition" is that uninformed judges, in this instance the backlashers, tend to confuse their per-

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88. This key backlash gambit was brought into the open—and expressly rejected by a majority of the justices—in the remarkable dispute on this point recorded in the various opinions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In a plurality opinion joined only by Justice William Rehnquist, Justice Scalia embraced and cited the *Bowers* ruling, now repudiated wholly by *Lawrence*, to assert that history and tradition in backlash analysis should be reduced to the "most specific level . . . [that] can be identified." *Id.* at 127 n.6. Justice William Brennan observed that the assertion projected an approach to constitutional interpretation that was descriptively "novel" and prescriptively "misguided." *Id.* at 139-40. Though otherwise joining that plurality opinion, Justices Sandra Day O'Connor and Anthony Kennedy explicitly rejected that assertion, similarly observing that Justice Scalia's assertion "may be somewhat inconsistent with our past decisions in this area." *Id.* at 132. Citing *Griswold* and *Eisenstadt*, Justices O'Connor and Kennedy noted that, "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available" to the judges. *Id.*

Notably, this type of strained or "strict" approach to constitutional interpretation had been forcefully and specifically rejected during the nation's formative years, as exemplified in *McCulloch v. Maryland*. See 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature. In a unanimous opinion, authored by Justice John Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the "just" or "sound" approach versus the "narrow" or "strict" approach. Opting for the former, those justices reasoned that the former would entail a "baneful influence" on the nation due to the "absolute impracticality of maintaining it, without rendering the government incompetent to its great objects." *Id.* at 417-18. This rendering has been precisely the goal of every advocate who interposed these arguments in North American constitutional history. It likewise is the goal of cultural warfare and backlash activism: disabling the government from its capacity to reform entrenched social hierarchies established in part by force of law in eras of formal subordination based on race, ethnicity, gender, sexual orientation and other forms of social stratification, and that now are structurally entrenched culturally and materially in law and society. Historically dominant groups now waging backlash *kulturkampf* calculate, correctly, that their privilege and dominance vis-à-vis historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of federal power to reform historic injustices that have enriched and empowered them. See Valdes, *We Are Now of the View*, *supra* note 8 (discussing federal powers employed historically to disrupt locally entrenched monopolies of power).

sonal prejudices for them with alarming ease and fixation. This tendency occurs even while claiming that history and tradition actually are “objective” and, therefore, salutary because they are self-disciplinary anchors that prevent judicial appointees from indulging themselves ideologically or politically in the name of the Constitution.<sup>89</sup> In addition, the structural problem with this transparent circularity is that it endeavors to cast the world, or at least this nation, in the image of the original immigrants, freezing in time all realistic aspirations for significant social change with fairly predictable social effects. This freeze has the effect of perpetuating the existing, neocolonial stratification of society.<sup>90</sup> *Lawrence*, however, makes plain that backlash insistence on using “specific” formulations of history and tradition with the effect (if not purpose) of diminishing individual rights to liberty-privacy is not countenanced by any source other than the self-serving assertions of backlashing judges. There is nothing in the text of the Constitution, nor in the modern liberty-privacy jurisprudence developed by generations of judges from different ideological persuasions, that dictates or even counsels such a rights-destructive choice by today’s judicial appointees.<sup>91</sup> *Lawrence* thus provides an opportunity and call to remember that *Bowers*—now repudiated—catalyzed deployments of this source to diametrically opposed ends by ridiculing and rejecting as “facetious” *Hardwick*’s claim to equal privacy under existing liberty-privacy precedents from *Griswold* to *Carey*, while also atomizing the prior cases to deprive liberty-privacy of its jurisprudential coherence. *Lawrence* marks a timely opportunity, if not effective call, for the nation’s legal culture to recall that, in liberty-privacy jurisprudence at least, history and tradition consistently have been cited to help *supplement* judicial recognition of text-based protections, not to *undermine* them.<sup>92</sup>

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89. For a further discussion on the *Bowers* quintet’s misuse of history and tradition, see *supra* notes 45-47, 49 and accompanying text.

90. See generally Valdes, *Outsider Scholars*, *supra* note 5 (discussing Euro-heteropatriarchy theory).

91. This debate over history and tradition echoes similar concerns over “natural law” and constitutional interpretation, and raises the same kinds of institutional issues: the resort to natural law, like the resort to history and tradition, enables individual judges to insert their personal views and political values into constitutional analysis by exaggerating or fabricating convenient history and by ignoring or deflecting inconvenient aspects of the documented past. See generally *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (debating proper uses of natural law in constitutional interpretation and reflecting on similar concerns). As this mini-case study indicates, these tactics of exaggeration, fabrication or deflection sometimes are practiced through the manipulation of descriptions and of their levels of generality and specificity—in the judges’ words, by “careful description” of rights claims that in effect, if not on purpose, are repeatedly drawn in ways designed for ultimate rejection. See *supra* note 88 (discussing *Michael H.* and vigorous dispute recorded in those opinions over appropriate levels of description to guide judicial invocations of history and tradition in constitutional interpretation).

92. For a further discussion on the uses of history and tradition before and in *Bowers*, see *supra* notes 45-54 and accompanying text.

*Lawrence*, in sum, makes plain that history and tradition need not be reduced to the stingiest possible level of specificity to ensure that virtually no analogy ever will be found between modern life and 1787's practices. In doing so, *Lawrence* makes plain that Justice Scalia's litany of proclamations to the contrary in a host of culture war cases during the past decade or so are not binding on any of us. It makes plain that on this precise point—on the proper levels and uses of history and tradition as sources of constitutional interpretation—Justice Scalia opines loudly for himself and his backlashing cohorts, but not necessarily for the Court.<sup>93</sup> As such, this backlash dream should no longer be mistaken for formal constitutional law after *Lawrence*. At the very least, *Lawrence* makes strategic, superficial or self-serving deployments of history and tradition less plausible, providing much-needed relief to the Fourteenth Amendment's role in contemporary constitutionalism after decades of neglect and constriction under the sway of backlash jurisprudence.

b. History and Tradition as Experience and Evolution, Not as Frozen Time Capsule

Perhaps most significantly, *Lawrence*, by example, shows that history and tradition are not to be hallowed as holy artifacts of time frozen in the mold of 1787 and permanently limiting all future generations to the beliefs and habits that Western elites had adopted by then. Rather, *Lawrence* demonstrates how and why history and tradition are evolutionary concepts in constitutional interpretation. After *Lawrence*, history and tradition cannot be deemed to have stopped in 1787. Moreover, they cannot simply be reduced to the frequently self-serving descriptions passed down by dominant historians and mainstream storytellers.

On the contrary, *Lawrence* makes emphatically clear that these concepts must include the lived and living understanding of the past as comprehended by those living its legacies in the present. *Lawrence* makes it clear that the constitutional meaning of "liberty" in the Fourteenth Amendment is no more constrained by the notions of "liberty" in place by 1787 than is the meaning of "cruel and unusual" in the Eighth Amendment by the notions of "cruel and unusual" held back then.<sup>94</sup> *Lawrence* demonstrates, by example, that applications of history and tradition to elucidate Fourteenth Amendment text may, and perhaps even should, focus primarily on historical "trends" regarding contested practices or presumed

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93. See *supra* note 88 (commenting on express rejection of this position by seven of nine justices in 1989 case of *Michael H.* and more generally by entire Court in 1803 *Marbury* case).

94. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-62 (1989) (noting that principled interpretation of Eighth Amendment based on history and tradition would make maiming constitutionally permissible form of criminal punishment today because in 1780s it was practiced, thus today could not be "cruel and unusual punishment," nevertheless professed "originalist" as pure as he would become "faint-hearted" at that point, ruling contrary to conclusion that history and tradition compel).

beliefs, and on the inactions of the generations living in recent decades regarding those practices or beliefs, as opposed to fixating exclusively or principally on the most ancient, and increasingly most distant, practices, beliefs or generations.<sup>95</sup>

Thus, in the place of *Bowers's* strategic redeployment of ancient history and tradition (or superstitions) to short-circuit civil rights, *Lawrence* vindicates the view of history-as-evolution in a manner that, like the *Griswold* precedents, reinforced civil liberties in light of social experience and change. In this key way, *Lawrence* makes plain that the simple or conclusory intonation of "original" practices or antiquated cultural conceptions cannot be interposed in the course of constitutional analysis to block a contemporary recognition and implementation of the lessons accrued through social experience in the centuries since the Constitution's drafting.<sup>96</sup> In more common terms, *Lawrence* validates the seemingly endangered notion of a "living constitution" over the strategic demands of selectively "strict construction" that backslashers have tried to revive and impose during their years of ascendancy.

#### c. Comparative Normative Progression and "History" as the Sum of Shared Human Experience

Finally, this aspirational and evolutionary understanding of history and tradition includes taking judicial notice of experience and "progress" in analogous societies and legal systems: also by example, *Lawrence* shows how ongoing sociolegal evolutions in common law nations like England, or even those with civil law traditions but common cultural roots like other nations in Europe, illuminate the judicial search for contemporary discernment of the lessons to be drawn from invocations of the past. This combination of a comparative *and* evolutionary approach to history and tradition in *Lawrence* effectively provides an expanded normative baseline from which to measure the relevance of multiple local or regional histories, and of global trends or transnational trajectories, in the ongoing task of interpreting the Constitution in a constantly changing society. The final emancipatory potential benefit of history and tradition in *Lawrence* is the positive, evolutionary *and* globalized approach it embraces toward the use of history and tradition to make sense of constitutional text.<sup>97</sup>

95. See generally *id.* (discussing contrasting theories of constitutional interpretation of originalism and nonoriginalism).

96. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

97. Given the backlash domination of domestic law and the federal judiciary, Queer legal theorists also have examined international law and venues as alternative or supplementary means of achieving inclusion, equality and dignity in formal as well as social terms. See, e.g., Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996); Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996); see also James D. Wilts, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in the United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995); THE GLOBAL EMER-

More broadly, *Lawrence* makes plain that neither history nor tradition are conclusive or principal sources of constitutional interpretation that can be tossed out to trump all other considerations, canons or sources of construction. Instead of being selectively favored sources available for assertion whenever it suits the majority, history and tradition are two among many legitimate sources of guidance that, as recognized over the years by many judges regardless of ideology, may provide a "gloss" to express constitutional terms or text (such as the words "liberty" or "equality" or "cruel and unusual").<sup>98</sup> *Lawrence* makes plain that such glosses do not presumptively nor conclusively override other sources or elements of constitutional law—including, in this particular instance, judicial recognition of the subordinating effects imposed on contemporary persons by nominally "democratic" legislation rooted in the identity biases that travel under the rubric of history and tradition, or that backlash ideology might regard as implicit in concepts of ordered liberty.<sup>99</sup> Indeed, as if to underscore this point, *Lawrence* confirms in express terms that the Stevens dissent in *Bowers* had been right all along, both on substance and on method, in observing that these basic points regarding Fourteenth Amendment interpretation had been made "abundantly clear" by 1986 via *Griswold* and progeny.<sup>100</sup>

By putting history and tradition in their place as sources of constitutional interpretation, and by clarifying the operative notions of history and tradition appropriate to Fourteenth Amendment analysis, *Lawrence* inflicts a serious blow to the legitimation of contrary uses urged by backlash jurisprudence and their patrons, especially since *Bowers* relied heavily on strategically skewed invocations of (factually false) history and tradition to justify injustice on purportedly neutral and principled grounds.<sup>101</sup> By so doing, *Lawrence* also helps point the way beyond backlash. The substantive and methodological clarifications of history and tradition as sources of Fourteenth Amendment jurisprudence outlined above consequently are a key aspect of the benefits that *Lawrence* proffers to the ongoing evolution of constitutional law and civil rights. These benefits, as noted, are closely related to the rejection of *Bowers* and its embrace of formal inequality.

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GENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT (Barry D. Adam et al. eds., 1999).

98. In his concurring opinion, Justice Frankfurter stated:

Deeply embedded ways of conducting government cannot supplant the Constitution or legislation, but they can give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J. concurring) (invalidating executive seizure of steel mills to maintain military supplies for Korean War operations).

99. Indeed, this very kind of majoritarian action is precisely what the *Griswold* line of cases and *Romer* overturned. See *supra* notes 33 and 76 and accompanying text.

100. *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

101. See *supra* note 45 and accompanying text.



They also are related to *Lawrence's* substantive embrace of antisubordination values embedded in the Constitution generally, and in the Fourteenth Amendment specifically.

### 3. *Antisubordination Values and Critical Realism: Toward a Working Constitution*

In addition to overruling *Bowers* and putting history and tradition in their place, *Lawrence* also provides a salutary reminder of the antisubordination principle's central substantive role in constitutional analysis and law.<sup>102</sup> Simply put, the "antisubordination principle" stands for the proposition that law cannot be employed to create or perpetuate social and economic castes.<sup>103</sup> The substantive focus of antisubordination values consequently is fixed on actual social conditions and on their structural transformation, more so than on formal or surface reformation.<sup>104</sup> The distinction between "antidiscrimination" and "antisubordination" therefore represents a shift in foundational principles and purposes in the formulation of law and policy from formal to substantive equality.<sup>105</sup>

Significantly, antisubordination values are reflected in the Fourteenth Amendment's text and jurisprudence, and it therefore has been featured prominently in civil rights cases under the Equal Protection Clause.<sup>106</sup> Perhaps more to the point, antisubordination values also are embodied in the great body of federal civil rights legislation enacted by Congress and signed into law by successive Presidents during the 1960s and 1970s.<sup>107</sup> In short, antisubordination values are embedded in substantive law both as recent democratic public policy and also as original constitutional mandate.<sup>108</sup>

102. See Fiss, *supra* note 9 (articulating principle); see also Symposium, *Fiss's Way: The Scholarship of Owen Fiss: Introduction: The Constitutional Scholar*, 58 U. MIAMI L. REV. 1 (2003) (presenting collection of essays assessing this article and other works).

103. For a further discussion of antisubordination and its distinction from antidiscrimination, see *supra* note 10 and sources cited therein.

104. Since its early articulation, and especially in recent years, this shift from antidiscrimination to antisubordination has been championed perhaps most consistently and vocally by scholars associated with critical outsider jurisprudence. See Valdes, *Antidiscrimination*, *supra* note 9, at 271-73.

105. See Culp et al., *supra* note 10, at 2446-51.

106. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (describing antisubordination's role in equality and civil rights law).

107. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35 (2003) (explaining antisubordination policy objectives that underlie federal civil rights legislation, including voting rights laws).

108. Notably, key framers of the Constitution explained their work-product to their own generation by presenting it as a system of checks and balances designed to ensure that no political, social or identity-based "faction" would ever be able to "vex and oppress"—in other words, to subordinate—others in perpetuity; though the most salient social groups in the minds of the Framers were religiously based,

Yet, in recent years, the backlash campaigns of the culture wars have attempted to shroud antisubordination values in neglect and disparagement. The neglect takes the form of an exceedingly thin and formalistic doctrinal preference for a backlash version of formal equality under the antidiscrimination principle. This sets into motion analyses that both social experience and critical scholarship show are likely to produce formal legal blindness that helps to sustain extant structures of identity-based subordination.<sup>109</sup> The disparagement takes the form of a rhetorical and selective dismissal in favor of “democracy” and majoritarianism, even when democracy is presented as a transparent fig leaf. For example, in *Bowers*, democracy is merely the judicially “presumed belief” of long-dead persons whose legacy was not, in any event, targeted at the particular identities targeted by the judges in their name.<sup>110</sup> Under the rule of backlash jurisprudence, the antisubordination principle therefore rarely has been honored (except in the breach). Consequently, the structural and material stratification of society based on race, ethnicity, sex and other neocolonial fault lines correlated to familiar social groups and identities remain culturally pervasive and economically entrenched despite a half century of formal equality.<sup>111</sup>

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they expressed the concern in terms of social groups or “factions” constructed by identity, geography, property or industry. See THE FEDERALIST NO. 10 (James Madison). As a matter of design, structure and theory, the antisubordination principle now vindicated in *Lawrence* stands as original constitutional intent and policy. The curious thing about this arousal of antisubordination in *Lawrence*, therefore, is not that it took place, but that it did so in a time otherwise enveloped by the subordinating politics of backlash kulturkampf.

109. For an early and incisive analysis of this doctrinal choice, see Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (presenting similarly focused analysis of entrenched social habits based on traditional forms of identity-focused prejudice). See generally *supra* note 11 and sources cited therein (discussing retrenchment, backlash and cultural counter-revolution in law).

110. See *supra* note 75 and accompanying text on Georgia’s sweeping definition of sodomy in the *Bowers* statute. Ironically, this disparagement in the name of democracy takes place alongside the judicial dismantlement of democratic law-making, as illustrated by backlashers’ retrenchment of voting rights legislation and other civil rights statutes of the twentieth century, in the culture war cases of the past two decades. See, e.g., Issacharoff & Karlan, *supra* note 107, at 24-32 (explaining antisubordination policy objectives that underlie federal civil rights legislation, including voting rights laws).

111. See Wendy B. Scott, ‘CSI’ After Grutter v. Bollinger: Searching for Evidence to Construct the Accumulation of Wealth and Economic Diversity as Compelling State Interests, 13 TEMP. POL. & CIV. RTS. L. REV. 927 (2004), available at <http://ssrn.com/abstract=627022>. Consequently, “class” and other forms of identity, such as race and ethnicity, remains structurally and empirically intertwined. See, e.g., Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACK-LETTER L.J. 1 (1991) (exploring reasons for continuing segregation of African Americans in pockets of poverty); Diedre Martinez & Sonia M. Perez, *Toward a Latino Anti-Poverty Agenda*, 1 GEO. J. ON FIGHTING POVERTY 55 (1993) (exploring ways of eradicating or mitigating impoverishment of Latinas/os in United States);

It thus is remarkable that *Lawrence* now centers antisubordination values as the normative linchpin of the analysis and holding. Yet *Lawrence* does indeed adopt the antisubordination principle as the standard of Fourteenth Amendment jurisprudence in no less than four key and inter-related ways. First, it vindicates the constitutionally protected “liberty” of all persons to be secure in their homes and in their identities against the intrusions or impositions of the state regardless of moralistic majoritarian preferences.<sup>112</sup> Second, it vindicates the basic structural principle of the Fourteenth Amendment: that law and policy may not be deployed to “demean” or “control the destiny” of minority-identified persons and groups disfavored by majoritarian forces.<sup>113</sup> Third, it affirms a related structural principle of the Fourteenth Amendment: that formal or nominal democracy—like direct democracy—cannot be bootstrapped into the construction of perpetual group supremacies and caste systems.<sup>114</sup> Fourth, it recognizes the impact of criminal law in non-criminal venues of life, precisely (in this case) to “demean” and “control the destiny” of sexual minorities, thereby entrenching in apparent perpetuity a heterosexual supremacy.<sup>115</sup> In combination, these four inter-related features of the majority opinion champion long-standing, yet recently sidelined, antisubordination values over circular or self-justifying claims of neocolonial power and majoritarian privilege. As *Lawrence* itself displays, however, this possibility of substantive equality depends on the joinder of antisubordination normativity with critical realism as method.

*Lawrence* is reminiscent of the realist and critical traditions in law and legal analysis.<sup>116</sup> In other words, *Lawrence* frankly recognizes and owns up

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see also Paul Ong & Suzanne J. Hee, *Economic Diversity*, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES 31, 31-56 (Paul Ong ed., 1994) (comparing earnings of Asian Americans to whites and noting that nearly half of all Americans of Southeast Asian descent live in poverty); Gerald Lopez, *Learning About Latinos*, 19 CHICANO-LATINO L. REV. 363 (1998) (discussing socioeconomic and demographic condition of Latina/o communities in United States). For a current “official” portrait noting that “race and ethnicity continue to be salient predictors of well-being in American society . . . [affecting] health, education, and economic status,” see COUNCIL OF ECONOMIC ADVISERS, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 2 (1998).

112. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

113. See *id.* at 564-67.

114. See *id.* at 566-70.

115. See *id.* at 575-76.

116. For a notable and relatively recent articulation of this jurisprudential line, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997). See also Symposium, *Roll Over Beethoven: Critical Legal Studies*, 36 STAN. L. REV. 1 (1984) (presenting earlier collection of works in critical legal studies genre). For illuminating other examples with relevance to a critical comprehension of backlash jurisprudence, see Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; cf. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Of course, as with the many “big picture” issues implicated by the current controversies over the legiti-

to the obvious interconnection of the formal to the social in this case. The majority, for example, unabashedly acknowledges the intent and effect of sodomy criminal sanctions and the pervasive societal subordination justified precisely on the presumed criminality of sexual minorities.<sup>117</sup> This realist/critical approach to constitutional categories permits the majority to “see” and explain in detail how sodomy statutes function socially. It permits the Court to discern and describe the interplay of “law” and “society” and of “criminal law” and “societal discrimination” and of “private” and “public” dimensions of human life.<sup>118</sup> Specifically, in *Lawrence*, the justices were able to detect that sodomy statutes, while nominally a proscription of ostensibly only specific conduct, in fact operated culturally and structurally to legalize and legitimate the systematic subjection of sexual minorities through the arbitrary denial of housing, employment and other social goods necessary to survival, much less success.<sup>119</sup>

Indeed, it was precisely the Court’s willingness to acknowledge the functional linkages between formal and doctrinal categories that put on display why and how the “extent of the liberty interest at stake” went well beyond the act of “sodomy” as statutorily defined to include “control over personal relationships” and the “freedom [of all persons] to choose” their intimate associations without state punishment, branding or regimentation;<sup>120</sup> control, in other words, over the very composition of “personhood” and individuation.<sup>121</sup> Tethered to antisubordination values, this realist and critical approach positioned the Court to detect the intent and purpose behind the Texas statute and similar legislation in practical

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macy of backlash jurisprudence, the issues that today’s critical scholars highlight reflect similar concerns and engagements from previous generations. See, e.g., John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924-25); Henry Wolf Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

117. See *Lawrence*, 539 U.S. at 572-77 (discussing “stigma” attached to homosexuals by sodomy statute).

118. It also bears note that feminist and other scholars have amply demonstrated that the distinction between “public” and “private” spheres of law and society oftentimes is a tool to justify the subordination of women as a social group. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (critiquing gendered notions embedded in legal rules and doctrines); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (critiquing public/private distinction and its gendered ideological underpinnings); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (surveying Feminist legal scholarship and salient points of, or interconnections among, varied currents of feminism in legal theorizing). See generally GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986) (providing comprehensive historical account of gender roles and corresponding hierarchies).

119. See *Lawrence*, 539 U.S. at 581-82 (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)) (discussing impact on Texas homosexuals).

120. This approach also enabled the Court to see and elaborate the interplay and interconnection of liberty, privacy and equality as doctrinal categories. See VALDES, *Four Score*, *supra* note 12.

121. See Rubinfeld, *supra* note 82 (discussing liberty-privacy and personhood).

and actual terms. Ultimately, this joinder of antisubordination normativity and critical realism situated the Court to focus on the actual functioning of sodomy laws in contemporary society rather than on formalistic or abstracted expostulations.<sup>122</sup> More than a living Constitution, this joinder of antisubordination values and critical realism may portend the possibility of a *working* Constitution—a Constitution fit to work soundly in contemporary society.<sup>123</sup>

### III. CONCLUSION

With few exceptions, today's backlashing judges continue to use every constitutional opportunity to redraw established or evolving lines of law and policy in favor of neocolonial elites. The liberty-privacy trinity that forms the illustrative case study here is but an exemplar of the patterns and politics of backlash *kulturkampf* and its jurisprudence. Despite the mounting victories of reaction and retrenchment in the political and policy battles of the North American culture wars of today, however, culture war cases like *Lawrence* show the pre-backlash heritage of the nation. The case study above thus illustrates both the tactics and techniques of backlash jurisprudence as well as some of the ways and means that LatCrit and OutCrit scholars will need to deploy and develop in order to repair the damage already done, or yet to be done, under the rule of backlash. In this context, and at this urgent historical juncture, this year's conference theme and symposium provide a welcome and needed contribution to the intellectual, political, educational and jurisprudential work that remains before this nation that may once again resume its fitful, and certainly unfinished, quest to overcome original and enduring evils.

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122. The remarkably diverse array of amicus briefs submitted to the Court reflects the long years of hard work in coalition-building that took place in the seventeen years separating *Bowers* and *Lawrence*. Those briefs, cited by the *Lawrence* majority, and the sectors of society that they represented, made it more difficult than usual for insulated judges to opt for the comforts of formalistic distance to blind themselves to the lived realities presented by the cases. See *supra* note 10 and sources cited therein (discussing formal legal blindness).

123. For a discussion on Justice John Marshall's distinction between "sound" and "strict" construction, see *supra* note 88 and sources cited therein. For a recent articulation of similar observations and conclusions, see Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) (questioning premises of formalism, originalism textualism and other methods associated with backlash jurisprudence and its selective embrace of "strict construction").